91-525

Supreme Court, U.S.
FILED
AUG 19 1991
OFFICE OF THE CLERK

No. _____

IN THE

# Supreme Court of the United States

October Term, 1991

JEROME HOWARD HANOVER,

Petitioner,

v.

ROBERT M. RUCH, M.D.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, AT JACKSON**

# PETITION FOR WRIT OF CERTIORARI

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## ***QUESTIONS PRESENTED***

1. Was the action of the Tennessee Supreme Court whereby it retroactively abolished the tort of criminal conversation and thereby reversed a trial court jury verdict for the Petitioner a **violation of Due Process under the Fourteenth Amendment to the Constitution of the United States**?

## ***PARTIES TO THE PROCEEDINGS***

The parties to this petition are the same as the parties to the appeal to the Tennessee Supreme Court. These parties have been the same throughout each level of the civil action below, and the names of the parties are as reflected in the caption.

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## OPINIONS BELOW

The opinion of the Tennessee Supreme Court from which review is sought has been designated for publication. It has not been published by the West reporter system as of the drafting of this Petition. The Court's original opinion has been retyped for purposes of this Petition and attached to the Appendix hereto.[1] All citation to this opinion will be referenced to the page of the appendix. The opinion was originally filed on **April 15, 1991**. A *Petition to Rehear* was timely filed on April 24, 1991. An *Order* denying same was entered on **May 20, 1991**. The 90-day period for filing a Petition for Writ of Certiorari to this Court expires on August 18, 1991.

## JURISDICTION

The highest court of the State of Tennessee passed final judgment on this case on May 20, 1991. This Court's jurisdiction is based on 28 U.S.C. Sec. 1257, **"State courts; appeal; certiorari**

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in

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[1] Likewise, the Order on Petition to Rehear and the opinion of the Tennessee Court of Appeals has been retyped and appended hereto.

question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or law of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

## CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner alleges that the action of the Tennessee Supreme Court violated Section 1 to the **Fourteenth Amendment** to the United States Constitution in that the Tennessee Supreme Court's action retroactively deprived the Petitioner of a valuable vested right. Said Amendment is affectionately referred to as the **Due Process Clause** and reads:

> **"§ 1. Citizenship–Due process of law–Equal Protection.**–All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any state deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Petitioner was married to his wife, Sandra, for a total of thirty-two (32) years before being awarded a divorce from her in

February of 1988. The marital relationship produced six (6) children. In January of 1983, Mrs. Hanover was examined by the Respondent, Dr. Robert Ruch, a prominent gynecologist, for standard "female problems," which resulted in his performing a hysterectomy on her in that month. Later that same year, Dr. Ruch and Mrs. Hanover began an affair. As the Tennessee Supreme Court points out in its opinion, it is of no importance that the participating spouse may be the aggressor or procure the wrongdoer to have intercourse with her. For factual purposes, as to the circumstances of this case, Dr. Ruch, abused his professional medical license and seduced Mrs. Hanover while she was exposed to him on his office table and began an adulterous affair with her that lasted for a little more than two years.[2] When Mr. Hanover ultimately learned of this secret relationship, he could not bear it and after being married for twenty-eight (28) years, he filed for divorce. He shortly thereafter sued Dr. Ruch for the torts of alienation of affection and criminal conversation.

Before trial and at every subsequent appellate stage of the proceedings, the Respondent moved the court to abolish alienation of affections and criminal conversation as causes of action in Tennessee. The motions were overruled and the case was tried in a jury trial on December 12-15, 1988. The jury held for

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[2] The testimony was that the first interlude of intercourse occurred on the floor of Dr. Ruch's office one evening.

Respondent Dr. Ruch on the issue of alienation or affections but on the issue of criminal conversation, the jury awarded a judgment of $125,000, $100,000 of which was punitive and $25,000 compensatory in nature. About six months after this case went to trial, the Tennessee General Assembly abolished alienation of affections as a cause of action.[3] Dr. Ruch timely appealed the judgment to the Tennessee Court of Appeals. The verdict was affirmed in its entirety by the Tennessee Western Section Court of Appeals by its decision entered of record on May 1, 1990.[4]

The common-law tort of criminal conversation was statutorily abolished by passage of a Bill on **April 12, 1990** by the General Assembly of Tennessee, which Bill was signed by the Governor on **May 1, 1990**. It is **important** to note that the Bill **was not even given immediate effect but instead, contained an effective date of January 1, 1991.** The actual bill read:

> SECTION 1. On or after the effective date of this act, no cause of action shall be maintained that is based upon the common-law torts of seduction or criminal conversation and such torts are hereby abolished. Nothing in this section shall be construed as prohibiting a cause of action based upon a sexual offense which offenses shall include, but not be limited to, those set out in Tennessee Code Annotated, Title 39, Chapter 13, Part 5.

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[3] Public Chapter No. 517. House Bill No. 937, signed May 25, 1989.

[4] Reproduced in the Appendix.

SECTION 2. Tennessee Code Annotated, Section 28-3-104(a), is amended by deleting the words and punctuation "criminal conversation, seduction".

SECTION 3. Tennessee Code Annotated, Section 20-1-106, is repealed in its entirety.

SECTION 4. This act shall take effect on January 1, 1991, the public welfare requiring it, provided any action filed prior to such date may be maintained under the law in effect on the date of such filing.

This case was then argued before the Tennessee Supreme Court in November of 1990, about six weeks before this new law was even to go into effect. Once again, counsel for Dr. Ruch argued that since he had always maintained in his first responsive pleading filed with the trial court that "the court should abolish criminal conversation as a cause of action in Tennessee," the Tennessee Supreme Court should judicially abolish the cause of action as to him effective July 22, 1986, the date the "Complaint" in the present case was filed.[5] The Tennessee Supreme Court rendered its opinion on April 15, 1991. The Tennessee Supreme Court, in a most enlightening decision, concluded that the General Assembly had actually wanted to retroactively abolish this specific cause of action but failed to do so because of 1) the constraints imposed by the Tennessee Constitution and 2) the legislative recognition of the constitutionally-required separation of legislative

[5] This argument was reduced to writing in Dr. Ruch's Application for Petition to Appeal filed with the Tennessee Supreme Court.

and judicial powers.[6] The Tennessee Supreme Court held that the tort of criminal conversation was obsolete and should thus be totally abolished and went so far as to give retrospective application to its ruling. The Court thus reversed the decision of the trial court, which had been affirmed entirely by the Court of Appeals, and thereby deprived Petitioner of a vested right, which he maintains was done in violation of our Due Process Clause.

## REASONS FOR ALLOWING THE WRIT

The decision of the Tennessee Supreme Court which **retroactively** took away a jury-awarded judgment by retroactively abolishing a long-standing, valuable, common-law cause of action - which right was moreover vested at the time - is in **conflict with the Fourteenth Amendment to the Constitution of this great country**, as well as being in conflict with prior decisions of this Court and the highest courts of other states dealing with this same issue.

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[6] See Appendix, Page Appendix-10

## ARGUMENT

### A. *Even though a judicial decision generally has retroactive effect, a court may not apply its ruling retroactively if it violates the Due Process Clause of the Fourteenth Amendment.*

This case involves a judicial attempt to retroactively abolish a **valuable common-law cause of action** in Tennessee so as to deprive the Petitioner of the judgment he obtained against the Defendant by a jury trial more than two years prior thereto. **It is important to distinguish up front** that the due process concerns for this type of judicial or legislative[7] action - where the action retroactively deprives one of existing rights - are **not the same** as those when the action legislature, attempts to retroactively add certain rights or causes of action that would not have been allowed without the power of retrospective application.

As the opinion of the Tennessee Supreme Court points out, the **General Assembly** in the State of Tennessee is without authority to enact retroactive laws affecting **vested substantive rights.**[8] However, based on the decision at hand, it is apparently the opinion of the Tennessee Supreme Court that the **supreme**

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[7] Tennessee is among the minority of states whose state constitution actually contains specific provisions against certain forms of retroactive laws.

[8] Tenn. Const. Art. I, § 20, which reads, "No retrospective laws. – that no retrospective law, or law impairing the obligation of contracts, shall be made."

**judicial body** in Tennessee may **constitutionally** apply its decisions retroactively even if such application affects vested substantive common-law rights. As initial support for its ruling, the Tennessee Supreme Court, in footnote 3 at page Appendix-10, refers to the Davis v. Davis[9] case, whereby the court abolished the interspousal tort immunity, and applied its decision retrospectively, thereby permitting one spouse to sue the other for a tortious act, which act would not have given rise to a cause of action under the law the existing at the time the act occurred due to the interspousal immunity law. However, as just stated in the paragraph above, the same Due Process considerations which argue **against** the **retroactive deprivation** of rights do not hold true for the retroactive expansion of one's rights. Thus, the Davis decision is not support for the action the Tennessee Supreme Court has taken in the case sub judice.

The Due Process Clause of our federal constitution has been one of the most vigorously protected provisions of same. **The Tennessee Supreme Court has totally ignored this Clause by its decision in this case.** It has further ignored the numerous decisions of its sister states and federal circuits that have reviewed the retroactive application of any law or judicial decision. Finally, it has ignored the prior rulings of this High Court of our country. The protection of vested rights is of greater importance than

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[9] 657 S.W.2d 753 (Tenn. 1983).

honoring the personal whim of five men who sit as a supreme court of justice and place their own individual beliefs above those of the more than 125 elected legislators of the State of Tennessee, especially when the judicial body's action goes against one of the fundamental backbones of the American judicial system. Because of the great importance placed on upholding the Due Process Clause, this Court should grant this Petition and issue the cert prayed for.

### *B. A Historical look at "retroactive laws" - Relevance of the Fourteenth Amendment*

There are two provisions of the **US Constitution** that regulate the **federal** government's passage of **retrospective** civil statutes. **Article 1, Section 10**, of the US Constitution provides that **"no State shall . . . pass any . . . Law impairing the Obligation of Contracts."**[10] The **Fifth Amendment** prohibits the federal government from depriving any person of property **without due process of law**. The **Fourteenth Amendment** to the US Constitution extended the Due Process clause to state action.[11] "The Fifth Amendment **reflects a historic hostility to retroactive**

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[10] As just pointed out, Tennessee is one of the small minority of states whose Constitution explicitly forbids the passage of retroactive laws that affect vested rights.

[11] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

**legislation, grounded in common law**. Our jurisprudence dealing with retroactive civil laws has had a long evolution, in adaptation to the complexities of the nation's growth. The presumption of correctness that accompanies Congressional action is thus subject to an important restraint. It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the **justifications for the latter may not suffice for the former**."[12] The US Supreme Court has "never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts."[13] Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1983), at 733., See, e.g., Philadelphia, B. & W.R. Co. v. Schubert, 224 U.S. 603, 56 L.Ed. 911, 32 S. Ct. 589 (1912).

The importance of protecting one's vested right has been a topic of discussion among legal scholars for more than a century. A good point to start any discussion on the subject of retroactive law and the impairment of vested rights would be by quoting from

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[12] Patlex Corp. v. Mossinghoff, 758 F.2d 594 (Fed Cir. 1985).

[13] Tennessee Constitution, Article I, § 10 contains language similar to the federal constitution.

a 1927 article by Bryant Smith, which appears at 5 Tex L. Rev. 229 (1927), Retroactive Laws and Vested Rights.

> "One's first impulse on undertaking to discuss retroactive laws and vested rights is to **define a vested right**. But when it appears, as soon happens, that this is **impossible**, one decides to fix the attention upon retroactive laws and leave the matter of definition to follow rather than precede the discussion, assuming for the purpose that a right is vested when it is immune to destruction, and that it is not vested when it is liable to destruction, by retroactive legislation. (at page 229).
>
> . . . Typical arguments used against retroactive laws are that they are a 'violation of fundamentals principles,' inconsistent with 'the nature of republican and free governments,' contrary to the 'fundamental maxims of free government,' not in accord with 'sound legislation' and against the 'fundamental principles of the social compact,' violate 'principles derived from the general nature of free governments,' 'repugnant to the common principles of justice and civil liberty,' 'absolute injustice,' a violation of 'natural right,' against 'the great principle of Eternal Justice,' inconsistent with 'the principles of general jurisprudence' and 'monstrous.' (at page 237).
>
> . . . Any useful discussion of the subject is necessarily concerned with the separation of the good from the bad. What makes one retroactive law valid and another invalid? To say that those which conform to 'the great principles of eternal justice' are valid and those which violate that principle are invalid, however sincere as an outburst of righteous emotion, is of little or no use to decide a particular case. **It is now becoming the fashion, among those**

> **who have realized this, to smile at the naive simplicity of judges who, with such assurance of certainty, have applied the foregoing and other 'eternal principles' of which we have seen examples**. . . (at page 240).
>
> . . . The individual may not complain **if for an old remedy the legislature substitutes a new one equally effective** for his purposes, but where a remedy is extinguished or substantially impaired and no alternative remedy provided, whether we say the remedy is the right, or whether we recognize a distinction, the result is the same in either case, **namely, that, without the remedy, the right, for practical purposes, is also gone.** (Emphasis Added). (at page 243).

Just a year later, Mr. Smith found it necessary to expound on his earlier article and did so at 6 Tex. L. Rev. 409 (1928).[14] At page 414, he writes:

> . . . "'The courts,' said Professor Gray[15] 'with the consent of the state, have been constantly in the practice of applying in the decision of controversies rules which were not in existence . . . [appears in original text] when the causes of controversy occurred. . . . [appears in original text] The courts are constantly making ex post facto law.' . . . **The distinction between retroactive laws made by the courts and those made by the legislatures, is a distinction of practicability and <u>not a distinction of justice.</u>** That the one should provide judicial

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[14] This follow-up article carries the exact same title as the previous one.

[15] Gray, <u>Nature and Sources of Law</u>, (1909) 82

epithets while the other is taken for granted, would indicate that the consideration of the subject has been sentimental rather than scientific." (Emphasis Added).

Mr. Smith continues at page 427:

> "It would not be worth while if it were possible to comb the field for every such consideration relevant to the validity of a retroactive law in every sort of situation in which the question can arise. Among them all, it is believed that the **most important single inquiry** to be made, from the standpoint of the individual and aside from the public interest, is whether the retroactive law gives effect to or defeats the **bona fide intentions or reasonable expectations of the persons affected**, whether it lines up with the intervening course of events or assumes to turn them aside, whether it places the stamp of legality on that which was theretofore illegal or stamps as illegal that which was theretofore legal, whether it affirms or disaffirms the status quo." (Emphasis Added).

Similar comments are found in an analytical review of retroactive legislation at 73 Harv. L. Rev. 692, The Supreme Court and the Constitutionality of Retroactive Legislation:

> "The traditional principle invoked in determining the constitutionality of retrospective legislation is that a statute may not abrogate 'vested rights.'[16] However, it has long been recognized that the term 'vested right' is conclusory -- a right is vested when it has been so far perfected that it cannot

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[16] Citation omitted.

be taken away by statute.[17] More discerning commentators and judges have suggested that the true test of the constitutionality of a retrospective law is whether a party has changed his position in reliance upon the existing law, or whether the retrospective act gives effect to or defeats the reasonable expectations of the parties."[18]

*1. A common-law tort right of action is treated as a vested property right under Tennessee law, as well as by the laws of the overwhelming majority of the other 50 states and the federal court decisions. The present decision of the Tennessee Supreme Court is in conflict with this long-standing law.*

It is a fundamental principle of law that a "right of action" may be considered "vested," and if it becomes "vested," then the destruction of same may be a violation of the due process clause of the Fourteenth Amendment. Gibbes v. Zimmerman, 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342; Graham v. Goodcell, 282 U.S. 409, 51 S.Ct. 186, 75 L.Ed. 415; Forbes Pioneer Boat Line v. Bd. of Comrs., 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647 (1922). The law in Tennessee appears to be congruous with this principle. In a major Tennessee case dealing with this issue,

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[17] Citation omitted.

[18] Citation omitted.

Jones v. Morristown-Hamblen Hospital Ass'n., 595 S.W.2d 816, (Tenn.App. 1979), the appellate court stated:

> **"It is well settled that a vested right of action is as much property as are tangible things and is protected from arbitrary legislation, whether such right of action be based upon the law of contracts or upon other principles of the common-law.** Mabry v. Baxter, [11 Heisk. 682] 58 Tenn. 682 (1872); Collins v. East Tennessee, Virginia & Georgia Railroad Company, [9 Heisk. 841] 56 Tenn. 841 (1872); Coombes v. Getz, 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866 (1932); Pickering v. Peskind, 43 Ohio App. 401, 183 N.E. 301 (1930); 16A C.J.S. Constitutional Law § 614 (1956).[19] Such a vested right of action enjoys the full protection of the due process clauses of the Federal and State Constitutions. See State v. Louisiana Oil Refining Corporation, 176 So. 686 (La.App.1937), motion denied , 177 So. 476 (La.App.1937), aff'd 304 U.S. 197, 58 S.Ct. 832, 82 L.Ed. 1287 (1938), rehearing denied, 304 U.S. 589, 58 S.Ct. 1044, 82 L.Ed. 1549 (1938).

We recognize the general rule that no one has a vested right in a particular remedy for the

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[19] 16A C.J.S. § "CONSTITUTIONAL LAW" reads:

> Causes of action which have not yet accrued are not vested and may be abolished, and where a cause of action never existed, its denial by the legislature violates no constitutional right. A right of action for a tort to happen in the future is not property and may be abrogated by the legislature.
>
> On the other hand, an existing right of action which has accrued to a person under the rules of the common law, or in accordance with its principles, or which springs from contract, is a vested property right in the same sense in which tangible things are property and may not be destroyed or impaired by legislation.

enforcement of a right of action and, thus, that the legislature ordinarily may change existing remedies for the enforcement of rights, including those which have already vested, without denying due process of law, provided, a substantial remedy to redress that right by some effective procedure is given. Brandon v. Warmath , 198 Tenn. 38, 277 S.W.2d 408 (1955); Hope v. Johnson, [2 Yerg. 123] 10 Tenn. 123 (1826); Gibbes v. Zimmerman , 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342 (1933); 16A C.J.S. Constitutional Law § 614 (1956)." (Emphasis Added).

. . .

The following discussion, taken from 1 **Am.Jur.2d**, Actions § 2, illustrates the difference between a vested or accrued '**right** of action' and an unaccrued '**cause** of action':

> Although the courts sometimes confuse the term 'cause of action' and 'right of action' and state that a right of action at law arises from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant, in a legal sense, these terms are not synonymous or interchangeable. A right of action is the right to presently enforce a cause of action -- a remedial right affording redress for the infringement of a legal right belonging to some definite person; a cause of action is the operative facts which give rise to such right of action. The right of action does not arise until the performance of all conditions precedent to the action, and may be taken away by the running of the statute of limitations, through an estoppel, or by other circumstances which do

not affect the cause of action. There may be several rights of action and one cause of action and rights may accrue at different times from the same cause." (Emphasis Added).

Other court decisions parallel this reasoning. In Terracciona v. Magee, 148 A.2d 68, 53 N.J. Super. 557, (1959), the court first stated that "[T]he **general rule** in civil cases is that change of established law by judicial decision is retrospective." Fox v. Snow, 6 N.J. 12, 14, 76 A2d 877 (1950); Arrow Builders Supply Corp. v. Hudson Terrace Apts., Inc., 16 N.J. 47, 106 A.2d 271 (1954); Johnson v. State, 18 N.J. 422, 428, 429, 114 A2d 1 (1955). However, the term 'general' is an overstatement. The court went on to clarify that the same due process considerations govern such judicial retroactive action as they govern legislative action.[20] The court stated:

"To interpret the statute in question as being retrospective in operation would destroy a vested right

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[20] Most decisions concern the legislature's attempt to pass retroactive laws. When the high court of a state judicially makes retroactive laws, the only recourse one has from such action is to appeal the decision to the US Supreme Court. Either few persons have had the resources to attempt to get such review or this Court has not chosen to rule on such action in many instances as the research reveals very few such instances. Counsel for Petitioner would presume that the reality is the former of the two choices, thus creating the scenario that the high court of a state goes on at liberty to "do as it wants." The harshness of such reality is that, as in the case sub judice, five men sitting as a judicial body can arbitrarily substitute their personal, not legal, beliefs for the educated actions of the legislative body, which consists of far greater than five men, which representatives are entrusted by their constituents to represent tens or hundreds of thousands of citizens.

> of property which inured to the infant plaintiff on the day she sustained her injuries. It is **well settled** that an action arising out of tortious conduct is a **vested property right** which is protected against impairment by the action of a state, by virtue of the due process clause of the Fourteenth Amendment of the United States Constitution.

Similarly, it was stated in Dunlap v. Toledo & A.A. R. Co., 50 Mich. 470, 474, 15 N.W. 555, 556, (1883) by Judge Cooley that 'There is no doubt that a right in action, **where it comes into existence under common-law principles,** and is not given by statute as a mere penalty or without equitable basis, **is as much property as any tangible possession, and as much within the rules of constitutional protection**.' (Emphasis Added). And still further, the general rule was long ago also stated at 11 **Am. Jur.** 1206, Sec. 377:

> 'A vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference, **and whether it springs from contract or from the principles of the common-law,** the legislature may not take it away. To permit the legislature to destroy vested rights of action is in violation of the due process clause, and since the enactment of the Fourteenth Amendment, such legislation is invalid thereunder, although prior to the passage of this amendment there was no Federal constitutional limitation on the state legislatures or Congress preventing the destruction of vested rights of action.'" (Emphasis Added).

In an Alabama case, the court stated, "It is a fundamental precept of our jurisprudence that substantive legal interests spring from the law **in effect at the time such interests are alleged to have arisen or to have been violated**. For this reason, . . . courts have uniformly been reluctant to construe statutes as having retroactive operation . . . "[21] This concept has been deeply ingrained in our American legal system and most strongly adhered to for quite some time. More than a century ago, in A Treatise on the Operation and Construction of Retroactive Laws, as Affected by Constitutional Limitations and Judicial Interpretation,[22] at §172, entitled "**Right of action for tort cannot be impaired**," the author writes:

> "The right to recover for **personal or other** injuries resulting to one person by the torts of another, cannot be tortured into rights arising in contract. These, however, are **so sacred** as to be considered worthy of protection. Thus, where an act of negligence produces a personal injury, of which the person suffering the same was entitled by the existing law to recover the full amount proved, it was held that a subsequent statute limiting the recovery to a less sum would affect the rights of the injured party. He had a vested right, not only to compensation for his injuries, but to the measure of damages fixed by the law as it existed when the cause of action accrued.

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[21] Alabama Power Co. v. Director of Industrial Relations, 36 Ala.App. 218, 54 So.2d 786 (1951). (Emphasis Added).

[22] William P. Wade, 1880, in Chapter V. "**Laws Devesting Vested Rights.**"

. . . **A right of action for tort is a right of property protected by the Constitution.**" (Emphasis Added).

On this issue, the Fifth Circuit[23] has stated:

> ". . . **Rights of property which have been created by the common law cannot be taken away without due process**; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations.' Mondou v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912).
>
> . . . .
>
> The abolition of non-vested rights is especially innocuous if, as here, **one remedy is substituted for another**. New York Central Railroad Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917)."

At Section 171 of his treatise on Retroactive Laws, entitled "**Rights secured by judgment cannot be devested,**"[24] Mr. Wade further writes:

> "The rights secured to either party to a suit by an adjudication of the matter in controversy between them are proprietary rights which the Constitution will protect. The legislature has no power to set aside those rendered anterior to the statute, for any cause that would have been insufficient when the judgment was rendered."

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[23] Keller v. Dravo Corp, 441 F.2d 1239 (5th Cir. 1971).

[24] See text associated with Footnote number 22 on page 19 for the full citation to this treatise.

In the case sub judice, the Petitioner had already obtained a judgment and the case was on appeal to the State's intermediate appellate court level when the TN Legislature passed the law repealing 20-1-106, which codified the common-law tort of criminal conversation. His right to sue became vested when Dr. Ruch violated his wife and committed his act of criminal conversation. We have seen above that under the fact scenario of the present case, Tennessee case law considers that Petitioner indeed had a vested right at the time the case was heard before the Tennessee Supreme Court. "A substantive, vested right is an immediate right of present enjoyment or a present fixed of future enjoyment. To be vested, a right must be more than a mere expectation based on anticipation that an existing law will continue in effect."[25] Petitioner Jerome Hanover **undoubtedly had a substantive, vested right when it was retroactively abolished** by the Tennessee Supreme Court. And unlike the Keller case, another remedy was not substituted for the one taken away by the Tennessee Supreme Court.

Our Tennessee Supreme Court admits that the Legislature had no power to retroactively abolish the tort of criminal conversation because the Tennessee Constitution prohibits same. Why? Because the right sought to be abolished was a valuable

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[25] City of Sanford v. McClelland, 121 Fla. 253, 163 So2d 513 (1935).

right[26] which had become vested in the Petitioner. However, the Court felt it did have the power to do so. **Petitioner respectfully argues that if the Tennessee Constitution does not prohibit the judiciary branch of Tennessee from retroactively abolishing the judgment he obtained against the defendant herein, then the Due Process Clause does so prohibit such application; and if the Tennessee Supreme Court feels it has the authority to do what it did in this case based on the separation of powers under the Tennessee Constitution, then the Tennessee Constitution is violative of the Due Process Clause of the Fourteenth Amendment to the US Constitution and the latter prevails.**

Petitioner does not suggest that a judicial decision may never be given retroactive application. To the contrary, the Tennessee Supreme Court did correctly state that the judiciary has the power, where appropriate, to pass retroactive judgment. As was stated in Peerless Electric Co. v. Boweres, 164 Ohio St. 209, (1955) at 210, "The law in this area is well-settled. It is first important to note that **generally**, a court decision overruling a prior law is retrospective in its operation, and the effect is not that the former law was invalid, but that it was never the law. **However, one exception to this general rule is where vested rights have been acquired under prior law.**" (Emphasis Added).

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[26] A tort cause of action which had been reduced to judgment.

Since Petitioner had so acquired a vested right under the existing law, the action of the Tennessee Supreme Court was indeed unconstitutional in this case. Petitioner had a vested property right which was subject to protection under the Due Process Clause. As it was an existing right of action which had accrued under the rules of the common-law or in accordance with its principles at the time it occurred, it was a vested property right.[27] "As a property right it [wa]s entitled to constitutional protection."[28] We have seen that once a right of action becomes vested, it becomes the property of him in whom it vests and so, the destruction of such a vested right is clearly a violation of the Due Process Clause of the Fourteenth Amendment.[29] This Court should grant cert so as to review this decision and determine whether the action of the Tennessee Supreme Court violated the Due Process Clause under the facts of the case sub judice.

### *C. There is a great distinction between retroactively enlarging and diminishing one's rights.*

The great majority of reported cases dealing with judicial review of retroactive legislation concerns the changing of an

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[27] 16 C.J.S. Constitutional Law, §254 (1956).

[28] See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 33 L.Ed 548, 92 S. Ct. 2701 (1972).

[29] Barr v. Preskitt, 389 F. Supp. 496 (M.D. Ala. 1975).

existing Statute of Limitations, where the new law to which retrospective application is attempted to be applied, will have the effect of enlarging one's right to sue and take away a statutory defense presently existing in the hands of the wrongdoer. As was mentioned at the beginning of the "Argument" section, the considerations for the two types of effects are different. This Supreme Court has acknowledged this far back. Chase Securities v. Donaldson, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945). There, the Minnesota Statute of Limitations with respect to suits for Blue Sky Law violations was extended so as to revive actions which were barred by the then existing applicable Statute of Limitations. Of course, in such a situation, the constitutional challenge is being made by the wrongdoer, who claims to have had a vested right in the statutory defense to the cause of action.

As the Tennessee Supreme Court in its April 15 Order points out, it is only in very rare instances that this Court or any other Court in this country has ever exercised the power of rendering a decision which has **retroactive** effect, as it has now done in this case. What the Tennessee Supreme Court fails to acknowledge is that by its own admission - through citation to three prior cases as authority for the action it took in the case sub judice, the only time the Tennessee high court has ever made **retroactive law affecting vested rights is where by its action, it enlarged such rights, not diminished them**, or stated otherwise,

it added to one's rights as opposed to taking a vested right, as it has done in this case. In Kilbourne v. Hazelick,[30] the Court abolished the discriminatory rule denying the liability of a wife to support her husband. This **added** the right to a husband to demand support from his wife, just as the right existed vice versa. In Davis v. Davis,[31] the Court abolished spousal immunity and thereby once again, added the right of one spouse to sue another for injuries caused in tort. In Ford Motor Co. v. Lonan,[32] the Court made it easier for one to sue in tort by abolishing the privity requirement in strict tort. Once again, this added rights to one's potential causes of action.

An analogy can be drawn between the Ford Motor Co. case and a case from one of Tennessee's "sister states." In Hopkins v. Kurn, 351 Mo. 41, 171 S.W.2d 625, (Missouri 1943), the law with respect to contributory negligence was changed retroactively so as to affect torts which arose before such change. The defendant tortfeasor argued that he had a vested right in the defense and that the application of the new law was a violation of the Due Process Clause of the Fourteenth Amendment. The Court went off into a discussion of substantive versus procedure in its reasoning but the

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[30] 648 S.W.2d 932 (Tenn. 1983).

[31] 657 S.W.2d 753 (Tenn. 1983).

[32] 398 S.W.2d 240 (Tenn. 1966).

bottom line is that it was held that one does not have a vested right in the statutory defense. The effect was to enlarge the prospects of Plaintiff's prevailing at trial.[33]

None of the cases cited by the Tennessee Supreme Court as authority for the unconstitutional and unjust action it took in the case sub judice are instances where the Court rendered a decision which retroactively took away the vested right which someone had before the Court's decision. Counsel for Appellee would represent that just as there is no statutory authority for the Legislature of the State of Tennessee to **retroactively take away a vested property right** of a citizen, there is likewise no judicial authority to act accordingly as well. Stated otherwise, just as the Legislature may no pass laws which impair vested rights, the judiciary many not apply one of its decisions retroactively if it impairs a vested right. The role of the judiciary in this sense is no more expansive than that of the legislature. The purpose of the separation of powers is for the judiciary to be the "overseer" of justice and to rule unconstitutional any attempt at legislative action which retroactively impairs vested rights, not to go one step further and so empower the judiciary when it sees fit to so act. Such action

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[33] See also Valleytown TP v Women's Catholic Order of Foresters, 115 F.2d 459 (4th Cir. 1940) whereby it was likewise held that "no one has a vested right to rely on a statute of limitations to defeat a debt or other personal obligation, and therefore no vested right is violated in such a case 'when the legislature says time shall be no bar, though such was the law when the contract was made.'" (string citation omitted).

would amount to a **violation of the Due Process Clause of the US Constitution and possibly the Tennessee Constitution as well.** When substantive vested rights are retroactively impaired, it is offensive to the Fourteenth Amendment whether it is done by the legislative body or by the judiciary. That is why such action has never been done or attempted to be done by the highest court of Tennessee until this case and why it should now be reversed. Because this action violates our federal constitution, this Court should issue the cert herein prayed for by Petitioner.

### *D. The TN Supreme Court's action in expanding the perceived goal of the TN Legislature so as to give retroactive effect to the doing away with the cause of action for criminal conversation serves no 'discernible public purpose.'* [34]

It is ironic that the effect of the TN Supreme Court's action in the case sub judice was to benefit a "wrongdoer;" that is, the Court[35] used its extraordinary retroactive powers to help a wrongdoer in tort get out of liability for his wrongful act which he knew was wrongful when he undertook to do same. The writer has researched many hours and read more than 200 cases in preparing this brief and has yet to find a situation even remotely

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[34] This test was utilized by this High Court in Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936).

[35] Not the Legislature.

similar to this. To the contrary, the usual scenario is found where the legislature or Court has taken retroactive action which adds rights to an innocent party or injured victim of the wrong act. The reviewing Court will then be called upon to weight or balance the societal wrongs the act is intended to remedy against the interests of the affected persons who argue that the should be entitled to rely on existing laws when they conduct themselves at the time of their conduct.

The wrongdoer knows his act is wrong[36] when he[37] undertakes to do the act. He does not do it with the expectation or hope that the judicial or legislative system will make his act right at some time in the future before the injured party - the victim of the tort - sues him for his wrongful act. He plans his conduct with certainty and knows the consequences of his conduct based on the then existing law. The "public purpose" was served by the TN Legislature when it passed legislation in April of 1990 repealing the tort of criminal conversation effective January 1, 1991.[38] If the well being of the state of TN was in immediate jeopardy, the

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[36] One is presumed to know the law and ignorance of the law is no legal defense.

[37] The masculine gender is used here and throughout this brief on many occasions to refer to the feminine gender as well, and vice versa. Thus, the use of he or she - or him or her - is used to refer to one or the other at many instances in the brief.

[38] Said bill was not signed by the Governor until May 1, 1990.

Legislature could have certainly made the repeal effective immediately, but instead chose to delay its effect by another six months. It is not the proper role of the TN Supreme Court to use its judicial power to interject its own social values and "pass legislation," so to speak, different than that expressed by the members of the State Legislature. Neither the well-being, the economy, nor the public interest of the State of Tennessee was placed in jeopardy by the act of the Legislature in delaying the effective date of the repeal. Even forgetting the issue of retroactive versus prospective for the moment, the act of the TN Supreme Court here was totally improper, nothing more than a substitution of the values of the members of the State's high court for those of the members of the Legislature. At most, if the TN Supreme Court felt it necessary to act or add to the repeal, it should have simply made its effective date sooner, and thereby dismissed all those causes of action not filed within, say, thirty days of the passage of the repeal. There are numerous cases where the retroactive repeal or extension of a prior statute of limitations has been held valid, so as to revive claims which would have otherwise been barred under the original limitations period. But for a court to retroactively bar an action such as happened here is not supported by any case law.

***E. The action by the TN Supreme Court does not cure prior official conduct of government officials who***

***have acted without the requisite authority nor does it cure defects in the administrative system.***

**This Supreme Court has in the past the above two "curative" reasons as bases for upholding retroactive action of the Legislature.** See 73 Harv. L. Rev. 692, Id. at page 703. The logic behind such favorable treatment of curative retroactive statutes is best explained by the strong public interest in smooth functioning of government. The retroactive application of the Tennessee public bill abolishing the tort of criminal conversation was not necessary to achieve either of these goals. There was no defect in the codification of the common law which made it a statutory wrong to engage in sexual intercourse with the wife of another man, just as there was no defect in the common law which held this to be wrongful conduct prior to such codification. Such conduct has in fact been against God's will from the beginning of civil law when the Lord stated in his **"Ten Commandments"** that "thou shall not commit adultery." It is a rather sad reflection on our ethical and moral society that we have gone so far astray as to now accept such conduct as permissive without any recourse. But one thing is for sure, when the Defendant in the state action below, Dr. Robert Ruch, engaged in such conduct, he knew it was against the then existing law. He knew that Jerome Hanover, the Petitioner herein, had a marriage of 28 years to Sandra Hanover when he willingly violated that sacred relationship. It is most

unusual that the TN Supreme Court used retroactive powers to assist the wrongdoer, Dr. Ruch, to absolve him of his wrongdoing.

### *F. The act of the TN Supreme Court totally abrogated an existing right.*

This Supreme Court will often look at the extent to which a retroactive statutory scheme abrogates or modifies an asserted preenactment right when reviewing retroactive legislation. Thus, the High Court expressed long ago a familiar statement that the legislature may modify the **remedies** for the assertion or enforcement of a right but may **not** abolish the right itself.[39] Again, this analysis has also been called conclusory and thus is hard to use in deciding a particular case. Suffice it to say that the greater the alteration of existing legal incidents of a claim arising from preenactment transaction, the greater is the case for holding the statute unconstitutional. Thus, although statutes have been upheld when they have limited the time period within which has to bring an action, it is unprecedented in the research of this writer for a Court to **retroactively make permissible tortious conduct which was impermissible at the time.**

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[39] See, e.g. Crane v. Hahlo, 258 U.S. 142, 147 (1922); League v. Texas, 184 U.S. 156, 158 (1902).

### G. *There was no legitimate public policy exception for the Tennessee Supreme Court to retroactively abolish the tort of criminal conversation.*

#### 1. *The cause of action for the conduct complained of in the case sub judice is one of the oldest common law actions in existence.*

The decision of the Tennessee Supreme Court traces the historical development of the action for alienation of affections and criminal conversation.[40] The cause of action for these torts dates back to the beginning of the Anglo-Saxon common law. According to the decision at issue in this cause,[41] it was first recognized in Tennessee by the Court of Appeals in Stepp v. Black, 14 Tenn. App. 153 (1931), cert. denied March 5, 1932.

Respondent's appeal to the Tennessee Supreme Court dealt solely with an issue that had already been adequately addressed by the Tennessee General Assembly. As explained in the "Statement of the Case" section, while this case was pending a hearing before the Tennessee Supreme Court, the Tennessee General Assembly

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[40] As stated in said opinion, "In its general and comprehensive sense, the term 'criminal conversation' is synonymous with adultery.'" Turner v Heavrin, 182 Ky. 65, 206 S.W.2d 23 (1918).

[41] Page Appendix-7.

acted to abolish the cause of action for criminal conversation in May of 1990, but not to become effective January 1, 1991.[42]

This High Court of the United States of America stated that "[T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, **no less through its courts than through its legislature**, and no less when a taking is unintended than when it is deliberate."[43] (Emphasis Added). As the Tennessee Supreme Court stated in its Opinion, *"where the legislature has not acted, we have not hesitated to abolish obsolete common-law doctrines. Indeed, we have a special duty to do so where it is the Court, rather than the Legislature, which has recognized and nurtured the action."* [44] A reading of the many cases on the subject of retroactive laws shows that the cases have on many occasions used the furthering of public policy and legitimate legislative foals as a basis for justifying such action.[45]

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[42] Senate Bill No. 1087, passed on April 12, 1990 and signed by the Governor on May 1, 1990.

[43] Justice Stewart in Hughes v. Washington, 389 U.S. 290 (1967) at 298.

[44] Page Appendix-11

[45] A good example of such cases is the following language: "The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common-law, **to attain a permissible legislative object.**" Silver v. Silver, 280 U.S. 117, 122 74 L Ed 221, 50 S Ct 57, 65 ALR 939 (1929); See Ortwein v. Schwab, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1978); Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1983); Adair v. Koppers Co., 541

As to the issue which is before the Court in the case sub judice, criminal conversation, the Tennessee Legislature had indeed already so acted and taken what it, in the minds of a great many persons, thought to be appropriate action, and there was thus no further need for the special duty of this Court.

The decision of the Tennessee Supreme Court fails to address the fact that perhaps back in 1983, when Respondent Dr. Ruch began this wrongdoing to satisfy his lust, the morals of the persons entrusted with acting as legislators by the constituents of the citizens of the state of Tennessee might have been different than those sitting in 1990 when the change in law was passed; and that apparently, as expressed by the existing law at the time, "the public policy, as expressed by the Legislature" (in 1983,[46] 1984, 1985, 1986, 1987, 1988, 1989 and all previous years), was **not offended by the law on criminal conversation** but instead, to the contrary, was offended by insidious and dishonorable - and lest we not forget, adulterous - acts of indiscretions by persons of this state, especially physicians overreaching their patients and thereby destroying a marriage of 25 plus years, as the acts of criminal conversation by the defendant did in the case sub judice.

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F. Supp. 1120 (N.D. Ohio 1982).

[46] The year in which the tortious act first occurred.

When the act was done in 1983, the morals of Tennessee society still had higher values. The *Seventh Commandment* given over 3500 years ago to mankind by God at Mount Sinai was "thou shalt not commit adultery."[47] The Words pronounced by the Ten Commandments from that historic date to the present have been the 'Guide of Conduct' to mankind. The Revelation by God on Mount Sinai was the most remarkable event in the history of humanity and which was destined in time to illuminate the souls, and order the lives, of all the children of men. These Words cannot be antiquated as long as the world endures. The Tennessee General Assembly wisely recognized this fact for many years in choosing not to abolish the tort of Criminal Conversation, even after many other states had taken such action. The Legislature resisted temptation until they were finally forced to change the law to conform them to satisfy the hedonistic behavior of the masses. Although this Highest Court of our country has no power to raise the social conduct of the citizens of this state and others back up to the standards of our forefathers by totally reversing the decision of the Tennessee Supreme Court, it can see that justice is done in this case by denying the high court of Tennessee the power to retroactively abolish the tort as it did in this case, on the basis that such act was clearly in violation of the Due Process Clause. This court should issue certiorari to see that this injustice is rectified.

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[47] Book of Exodus, Chapter XX, Verse 13.

## CONCLUSION

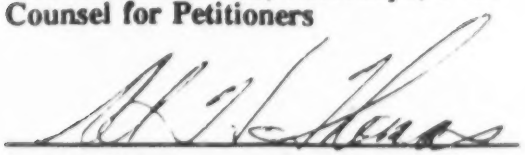
Prior to this case, it had always been the policy of the Tennessee Supreme Court to leave itself outside of the realm of law making, leaving same up to the legislature, except when the legislature has grossly shirked its responsibility to change the laws to reflect the changes in obvious public policy. In this case, the legislature had so acted and had passed law which abolished the tort of alienation of affections and subsequently, criminal conversation, whether right or wrong. The passage of the law was done by a large body of elected representatives presumably representing the voice of the citizens of this State. They expressed what the public policy of this State was to be as of January 1, 1991. Now, five persons sitting as a judicial body have usurped the power of the legislature and in a precedent unforseen hereto, gone many steps further and have declared what they believe the public policy of this state should have been back in 1983, 1984, +1985, 1986, etc. The legislative body of this State expressed what they felt the public policy of this State to be when they wrote this law: **"This act shall take effect on January 1, 1991, the public welfare requiring it, provided any action filed prior to such date may be maintained under the law in effect on the date of such filing."** If the legislature felt so strongly the need for immediate urgency, it could have made the law effective immediately. Instead, it was passed in May of 1990 and was not

to take effect until January 1, 1991. The Tennessee Supreme Court has now exercised extraordinary power **in violation of the Fourteenth Amendment's Due Process Clause** to retroactively tell Dr. Robert Ruch that despite his knowing his act was wrong at the time, we're going to judicially come to your rescue and say that what you did was not wrong at the time in our opinion, even though the legislators of this State and all previous judges who have sat on the high court of the State of Tennessee have felt it was wrong at the time your act was committed.

It is apparently impossible to frame a test with a single common denominator that the courts can use to decide the legality or constitutionality of retroactive action by legislatures or court tribunals. The common thread or factor most often seen running through the analyses of such review is the extent to which the parties involved have placed reasonable reliance on the law existing at the time of the conduct whose legal consequences would be affected or altered by the attempted retroactive action. The two sides of the coin are the strength of the public interests served by the retroactive action and the unfairness created by the retroactive operation.

For all of the foregoing reasons, Petitioner Jerome Hanover respectfully submits that this Court should grant his Petition, that a writ of certiorari should issue, and that the decision of the Tennessee Supreme Court below should be reversed.

Respectfully Submitted,
**Thomas & Thomas, Attorneys, P.C.**
**Counsel for Petitioners**



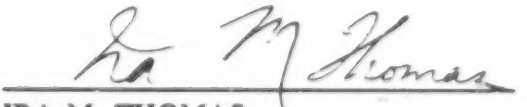
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**Counsel of Record**



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CERTIFICATE OF SERVICE

I hereby certify that I have served 3 copies of the foregoing pleading on all adverse parties and/or their respective attorney(s) of record, Hal Gerber, Attorney at Law, Brinkley Plaza, 80 Monroe Avenue, Suite 410, Memphis, Tennessee 38103, and Deborah Godwin, Attorney at Law, 263 Court Avenue, Memphis, Tennessee 38103, U.S. mail, postage prepaid, this August 13, 1991



IRA M. THOMAS

# APPENDIX

Appendix-1

DECISION OF THE TENNESSEE SUPREME COURT ON PETITION TO REHEAR

**IN THE SUPREME COURT OF TENNESSE**
**AT JACKSON**

| | | |
|---|---|---|
| **JEROME HOWARD HANOVER,** | ) | |
| | ) | **FOR PUBLICATION** |
| **Plaintiff/Appellee,** | ) | **Filed April 15, 1991** |
| | ) | |
| **vs.** | | **SHELBY LAW** |
| | ) | |
| **ROBERT M. RUCH, M.D.** | ) | **HON JAMES E. SWEARENGEN** |
| | ) | |
| **Defendant/Appellant.** | ) | **S/C No. 7** |

A Petition to Rehear has been filed in this cause which the Court has considered and concludes should be denied. It is so Ordered.

Per Curiam

ORIGINAL DECISION OF THE TENNESSEE SUPREME COURT

**IN THE SUPREME COURT OF TENNESSE AT JACKSON**

| | | |
|---|---|---|
| **JEROME HOWARD HANOVER,** | ) | |
| | ) | **FOR PUBLICATION** |
| **Plaintiff/Appellee,** | ) | **Filed April 15, 1991** |
| | ) | |
| **vs.** | | **SHELBY LAW** |
| | ) | |
| **ROBERT M. RUCH, M.D.** | ) | **HON JAMES E. SWEARENGEN** |
| | ) | |
| **Defendant/Appellant.** | ) | **S/C No. 7** |

For Appellant:

Hal Gerber
Memphis, Tennessee

Deborah Godwin
Memphis, Tennessee

For Appellee:

Al H. Thomas
Memphis, Tennessee

REVERSED.

ANDERSON, J.

OPINION

We are asked to decide whether the common-law tort of criminal conversation should be abolished in Tennessee. The trial court jury found that the defendant had committed the tort of criminal conversation, and awarded the plaintiff compensatory and punitive damages.

The relevant facts are undisputed. The defendant, Robert M. Ruch, M.D., is a gynecologist. The plaintiff is Jerome

Hanover, whose wife, Sandra Hanover, was Dr. Ruch's patient. The sexual affair between Dr. Ruch and Sandra Hanover began in late October of 1983, and continued for two years, until November of 1985. Because of the affair and Dr. Ruch's conduct, Jerome Hanover filed a. divorce action against Sandra Hanover to end their 31-year marriage, and a civil complaint against Dr. Ruch, alleging three causes of action: criminal conversation, alienation of affections, and medical malpractice.

At trial, the jury returned verdicts for the defendant on the alienation of affection and medical malpractice counts, but found for the plaintiff on the claim of criminal conversation, and assessed compensatory damages of $25,000 and punitive damages of $100,000. The trial court approved the verdicts. The defendant appealed.

The Court of Appeals recommended the abolishment of the tort of criminal conversation, but recognized it had no power to act, and therefore affirmed the trial court. We granted the defe4dant's application to determine whether or not we should abolish the common-law tort of criminal conversation. We have decided that we should do so because the action is founded upon a property-based theory which has no place in contemporary society, because the social harm it causes far outweighs any justification for its existence, and because the Legislature has declared the action to be against public policy.

## HISTORY

Punishment for adultery[48] began at the time of the ancient Teutons, and varied widely among the different tribes.

> The husband, in most instances, was permitted to kill the lover if he found him in the act. Later, however, there are signs that the outraged husband who found his wife in the act of adultery might no longer slay the guilty pair, or either of them, but might emasculate the adulterer. Most tribes fixed a penalty which the lover had to pay the husband, and among the Anglo-Saxons the amount depended upon the station in life of the husband.

Lippman, The Breakdown of Consortium, 30 Colum. L. Rev. 651, 654-55 (1930).

Much later, the Anglo-Saxons, as a part of the development of the early English common law, established the actions of criminal conversation and alienation of affection. These early common-law tort actions originated from actions against third parties by the master for the enticement away of his servants, thereby depriving him of their services. Since the station of a wife under early common law was that of a valuable superior servant of the husband, an action was available to include the loss of her services by enticement. The rationale being that she was his property, just as the servant was his property. Historically, the two actions were somewhat different. The first, enticement (also called abduction), involved assisting or inducing a wife to leave

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[48] "In its general and comprehensive sense, the term 'criminal conversation' is synonymous with 'adultery'." Turner v. Heavrin, 182 Ky. 65, 206 S.W. 23 (1918).

her husband by means of fraud, violence, or persuasion. The injury was considered to be the loss of the wife's services and consortium. Enticement, or abduction, has evolved into what is commonly known today as the tort of alienation of affections. The second tort remedy available to an injured spouse at early common law was seduction, which today is commonly known as the tort of criminal conversation. Unlike enticement or abduction, seduction required an adulterous relationship between the plaintiff's spouse and the defendant, and no physical separation of the husband and wife was required. The purpose underlying an action for seduction was to vindicate the husband's property rights in his wife's person and to punish the defendant for defiling the plaintiff's marriage, family honor, and for placing the legitimacy of children in doubt. Comment, Stealing Love in Tennessee: The Thief Goes Free, 56 Tenn. L. Rev. 629 (1989); W. Prosser, The Law of Torts, S 124 at 873-75 (4th ed. 1971).

Since the action for criminal conversation is civil, rather than criminal, a legal fiction developed that damages for criminal conversation are compensatory rather than punitive. In Weedon v. Timbrell, 5 T.R. 357 (1793), Lord Kenyon held that where a husband lived apart from his wife, he could not maintain a criminal conversation action since the action was not punitive in nature, but compensatory, and since no loss of the wife's services was shown.

In 1818 Lord Byron described the English judicial process of evaluating "what a wife is worth":

> [H]owsoever people fast and pray,
> The flesh is frail, and so the soul undone:
> What men call gallantry, and gods adultery,
> Is much more common where the climate's sultry.
>
> Happy the nations of the moral North!
> Where all is virtue, and the winter season
> Sends sin, without a rag on, shivering forth
> ('Twas snow that brought St. Anthony to reason);
> Where juries cast up what a wife is worth,
> By laying whateler sum, in mulct, they please on
> The lover, who must pay a handsome price,
> Because it is a marketable vice.

Byron, Don Juan, Cato I, LXIII-IV.

In Seventeenth Century England, the criminal conversation action became extremely important, for it was necessary as a condition precedent to the procuring of a divorce through a private act of Parliament. With the establishment of a divorce court having the right to grant a decree of divorce for the adultery of the wife, the action for criminal conversation was no longer needed, and was abolished by statute in England in 1857. 21 Vic. C. 85, S 59 (1857).

The tort of criminal conversation was first recognized in Tennessee by the Court of Appeals in Stepp v. Black, 14 Tenn. App. 153 (1931), cert. denied March 5, 1932. A prima facie case merely requires proof of a valid marriage between the spouses and sexual intercourse between defendant and plaintiff's spouse during coverture. Rheudasil v. Clower, 197 Tenn. 27, 276 S.W.2d 345 (1953); Darneli v. McNichols, 22 Term. App. 287, 122 S.W.2d

808 (1938). Alienation of the spouse's affections is not a necessary element but is regarded as a matter of aggravation. Darnell, supra. Consent of the participating spouse is not a defenseIt is of no importance that the participating spouse was the aggressor or procures the defendant to have intercourse with her. Stepp v. Black, 14 Tenn. App. 153 (1931). The only defense to the action is connivance of the plaintiff. Both knowledge and acquiescence must be shown to establish consent or connivance. Otherwise, recovery is assured upon proof of the marriage between plaintiff and his spouse and an act of adultery occurring between the defendant and plaintiff's spouse during the marriage.

Suits for criminal conversation, like suits for alienation of affections, could only be brought by the husband at early common law. The husband was allowed to sue for criminal conversation in order to vindicate his property right in his wife's person and to punish the defendant for placing the legitimacy of his children in doubt. Due to the wife's disability of coverture, she had no right to bring an action for criminal conversation. This disability was removed by statute in Tennessee and accordingly, a wife can riow sue for criminal conversation. Comment, Stealing Love in Tennessee: The Thief Goes Free, supra.

## SEPARATION OF LEGISLATIVE AND JUDICIAL POWERS

The common-law tort of criminal conversation was abolished by the General Assembly of Tennessee as of January 1, 1991:

SECTION 1. On or after the effective date of this act, no cause of action shall be maintained that is based upon the common-law torts of seduction or criminal conversation and such torts are hereby abolished. Nothing in this section shall be construed as prohibiting a cause of action based upon a sexual offense which offenses shall include, but not be limited to, those set out in Tennessee Code Annotated, Title 39, Chapter 13, Part 5.

SECTION 2. Tennessee Code Annotated, Section 28-3-104(a), is amended by deleting the words and punctuation "criminal conversation, seduction".

SECTION 3. Tennessee Code Annotated, Section 20-1-106, is repealed in its entirety.

SECTION 4. This act shall take effect on January 1, 1991, the public welfare requiring it, provided any action filed prior to such date may be maintained under the law in effect on the date of such filing.

Chapter 1056, Public Acts of Tennessee 1990 (emphasis furnished by Tennessee Supreme Court).

By the enactment of this statute, the General Assembly has declared that criminal conversation actions are offensive to the public policy of the state. The plaintiff argues, however, that Section 4 of the statute deprives this Court of the power to abolish criminal conversation actions filed prior to the effective date of the statute. We find the plaintiff's argument unpersuasive for several reasons.

First, the General Assembly is without authority to enact a retrospective law, affecting vested substantive rights. Tenn.

Const. Art. I, § 20.[49] Where a statute alters the common law and results in deprivation of a valuable common-law right, such statute cannot constitutionally be applied retroactively. See Massey v. Sullivan County, 225 Tenn. 132, 464 S.W.2d 548 (1971).[50] It follows that a statute which expressly applied to previously-accrued common-law causes of actiori and purported to deprive the Court of its power to modify the common law, would be unconstitutional. We decline to adopt plaintiff's interpretation that Section 4 of the statute creates by implication legislation that would be unconstitutional if expressed. Consequently, we hold that the statutory exception for previously-filed actions was merely a

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[49] "No retrospective laws. – that no retrospective law, or law impairing the obligations of contracts, shall be made."

[50] In contrast, retroactive application of judicial changes in the common law is a unique feature of common law adjudication. For example, in Davis v. Davis, 657 S.W.2d 753 (Tenn. 1983), this Court abolished interspousal tort immunity, and applied its decision retrospectively:

> The trial judge was correct, under the then-existing law, in granting the motion for summary judgment. However, we have decided that the rule applied has beer) orphaned by logic and reason, and direct that the summary judgment be set aside and the matter remanded for further proceedings consistent with this opinion.

Id. at 759.

legislative recognition of the constitutionally-required separation of legislative and judicial powers.[51]

Second, the statute contemplates the possibility that this Court would abolish criminal conversation actions as a matter of Tennessee common law. Section 1 provides that no cause of action "shall be maintained" after the effective date. As noted above, this language, taken alone, would render the statute unconstitutional. But Section 4 adds a saving clause which provides that "any action filed prior to [the effective date] may be maintained under the law in effect on the date of such filing." (Emphasis added.) Determining the status of the common law in effect on the date of filing i's within the exclusive jurisdiction of this Court. Thus, the statute itself contemplates that the Supreme Court, not the Legislature, has the power to abolish a common-law tort retrospectively.

Finally, where the Legislature has not acted, we have not hesitated to abolish obsolete common-law doctrines. Indeed, we

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[51] **Sec. 1. Division of powers.** – The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.

**Sec. 2. Limitation of powers.** – No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Tenn. Const. art. II.

have a special duty to do so where it is the Court, rather than the Legislature, which has recognized and nurtured the action.

> It may be argued that any change in this rule should come from the legislature . . . . Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to consider an old and court-made rule.

Kilbourne v. Hazelick, 648 S.W.2d 932, 934 (Tenn. 1983) (abolishing discriminatory rule denying liability of wife for support of husband); Davis v. Davis, 657 S.W.2d 753, 758 (Tenn. 1983)(abolishing interspousal tort immunity doctrine). See also Ford Motor Co. v. Lonan, 217 Tenn. 400, 398 S.W.2d 240 (1966)(abolishing privity requirement in strict tort). Since the Court clearly has the power to consider old, court-made rules in the absence of statutory guidance, and since the Legislature may not constitutionally preclude such consideration, it would be anomalous for the Court to refuse such consideration where, as here, the Legislature has clearly expressed the public policy of the state.[32]

For these reasons, we conclude that nothing in the abolishment statute -- Chapter 1056 of the Public Acts of 1990 --

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[32] This is not to say that all legislation affecting common-law rights will be applied retrospectively by the Court. We hold only that such legislation does not deprive the Court of the power to modify common-law doctrines in previously-filed cases. Prospective legislation is a factor for our consideration, but is not dispositive of retrospective common-law adjudication.

deprives this Court of its power to consider the viability of criminal conversation actions which accrued prior to the statute's effective date.

## ABOLITION

The defendant argues that we should follow the nationwide trend[53] and abolish the tort of criminal conversation.

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[53] The clear nationwide trend has been to abolish the tort of criminal conversation. At least thirty other jurisdictions, either through case law or by statute, do not recognize the cause of action of criminal conversation. Ala. Code Sec. 6-5-331 (1975); Cal. Civ. Code Sec. 43.5 (West 1982); Colo. Rev. Stat. Sec. 13-20-202 (1973); Destefano v. Grabrian, 763 P.2d 275, 279 (Colo. 1988); Conn. Gen. Stat. Ann. Sec. 52-572f (West Supp. 1984); Del. Code Ann. tit. 10, Sec. 3924 (1974); D.C. Code Ann. Sec. 16-923 (1981); Fla. Stat. Ann. Sec. 771.01 (West 1964); Harrington v. Pages, 440 So.2d 521, 522 (Fla. App. 1983); Ga. Code Ann. Sec. 51-1-17 (1982); Hyman v. Moldovan, 305 S.E.2d 648, 166 Ga. App. 891 (Ga. App. 1983); Bilyk v. Chicago Transit Authority, 531 N.E.2d 1, 7, 125 Ill.2d 230, 125 Ill. Dec. 822 (111. 1988); Ind. Code Ann. Sec. 34-4-4-1 (Burns 1973 & Supp. 1984). Md, Cts. & Jud. Proc. Code Ann. Sec. 5-301 (1980); Gasper v. Lighthouse, Inc., 533 A.2d 1358, 73 Md. App. 367 (Md. App. 1987); Cotton v. Kambly, 300 N.W.2d 627, 628, 101 Mich. App. 537 (Mich ' App. 1980); Mich. Comp. Laws Ann. Sec. 600.2901 (West 1968); Minn. Stat. Ann. Sec. 553.02 (West Supp. 1984); Larson v. nn, 449 N.W.2d 751, 756 (Minn. App. 1990); Mont. Code Ann. Sec. 27-3-601 (1983); Nev. Rev. Stat. Sec. 41.380 (1979); Feldman v. Feldman, 480 A.2d 34, 125 N.H. 102 (1984); Zaragoza v. Capriola, 492 A.2d 698, 201 N.J. Super. 55 (1985); N.J. Stat. Ann. Sec. 2A: 23-1 (West 1952); N.Y. Civ. Rights Law Sec. 80-a (McKinney 1976); Cannon v. Miller, 322 S.E.2d 780, 71 N.C. App. 460 (1984); Ohio Rev. Code Ann. Sec. 2305.29 (Page 1981); Hardy v. VerMuelen, 512 N.E.2d 626, 628, 32 Ohio St.3d 45 (1987); Okla. Stat. Ann. tit. 76, Sec. 8.1 (West Supp. 1983-1984); Or. Rev. Stat. Sec. 30.850 (1983); Com. v. Shoemaker, 518 A.2d 591, 595, 359 Pa. Super. 111, 118 (1986); Pickering v. Pickering, 434 N.W.2d 758, 763 (S.D. 1989); Tex. Fam. Code Ann. Sec. 4.05 (Supp. 1984); Lucas v. U.S., 757 S.W.2d 687, 711 (Tex.

In this case, the Western Section of the Court of Appeals found the reasoning of Cannon v. Miller, 322 S.E.2d 780 (N.C. App. 1984), persuasive and recommended that the tort of criminal conversation be abolished:

> Unarguably, the integrity of the marriage relation and the preservation of marital harmony are interests deserving of judicial protection. Yet, we find general agreement among the authorities who have examined the issue that, on balance, the social harm engendered by the existence of these torts and the actual counter productive affect of the actions on a marriage outweigh the meritorious goals purportedly served by the actions. We find the reasons advanced by the majority of judicial authorities, commentators and state legislatures for the abolition of these actions to be well founded and convincing. . . .
>
> Apart from considerations of utility, we are persuaded that the very theory of recovery underlying [criminal conversations and alienation of affections] actions is without basis in contemporary society. The above actions have never fully shaken free from their property based origins, as evidenced by the fact that the consent of the participating spouse to the offending conduct, or even his or her initiation of it, will not bar the suit.

Id. at 800-01 (citations omitted).[54]

In Lentz v. Baker, 792 S.W.2d 71 (Tenn. App. 1989), the Eastern Section of the Court of Appeals extensively discussed the

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1988); Vt. Stat. Ann. tit. 15, Sec. 1001 (Supp. 1984); Va. Code Sec. 8.01-220 (1984); Lund v. Caple, 675 P.2d 226, 100 Wash.2d 739 (1984); Brown v. Thomas, 379 N.W.2d 868, 127 Wis.2d 318 (1985); and Wyo. Stat. Sec. 1-23-101 (1977). See Comment, Stealing Love in Tennessee: The Thief Goes Free, 56 Tenn. L. Rev. 629, 656 (1989).

[54] The North Carolina Supreme Court subsequently reversed and remanded for trial, holding that the intermediate appellate court had no authority to abolish the common-law tort. Cannon v. Miller, 327 S.E.2d 888 (N.C. 1985).

genesis of the actions for alienation of affections and criminal conversation, their susceptibility to abuse, and the reasons for abolishment. As they observed: Other states began to reject and limit the actions in the 1920s. Legal writers were critical of the actions, citing their uncertain basis in damages and the fact that damages were largely punitive in nature. The writers felt the actions had no proper place in modern law in view of their history. The actions for alienation of affections and criminal conversation both originated in the husband's power over the wife. With the emancipation of the wife it was argued that the original basis for both of the actions was removed and should have resulted in their total abolition. Other reasons cited for change lie in the peculiar susceptibility to abuse that both actions are subject. Still another reason was the fact that the actions attract disproportionate publicity, encourage unfounded claims, and induce innocent defendants to enter into settlements. Many state legislatures which have abolished the action have cited these reasons. Legal writers have also commented that legislative abolishment occurred because of a recognition of changed social concepts of family solidarity and function. The statutes relax traditional legal controls by recognizing and protecting increased freedom of association between each spouse and the outside world. Professor Prosser has commented that the actions have "afforded a fertile field for blackmail and extortion by means of manufactured suits in which

the threat of publicity is used to force a settlement." W. Prosser, Law of Torts, § 124 (1971).

As a result, in Lentz, the Court of Appeals recommended the abolishment of the tort of alienation of affection. It found that the action "diminishes human dignity, demeans the participants, inflicts pain upon the innocent, and does not prevent human misconduct." The court concluded:

> We are persuaded that in the final analysis, the action does not protect marriage or the family -- its only real justification -- and the harm it causes far outweighs any reason for its continuance. It should be abolished . . . .

Id. at 76. Although the Court of Appeals was primarily addressing the action of alienation of affection, the same analysis and the same reasons for abolishment apply to the action of criminal conversation.

In both cases, the Western and Eastern Sections of the Court of Appeals nevertheless concluded that as intermediate appellate courts, they were bound by present law. Both courts urged the abolishment of the torts. Shortly after each Court of Appeals' decision, the Tennessee General Assembly acted first in 1989 to prospectively abolish alienation of affections and again in 1990 to prospectively abolish criminal conversation.

We wholeheartedly agree with the Court of Appeals and the Legislature that the tort of criminal conversation is obsolete and should be abolished in Tennessee.

We are not unmindful of the precedential value of previous Tennessee cases.

> [O]ur commitment to stare decisis remains strong. Confidence in our courts is to a great extent dependent on the uniformity and consistency engendered by allegiance to stare decisis. However, mindless obeilience to this precept can confound the truth and foster An attitude of contempt.

Davis v. Davis, 657 S.W.2d 753, 758 (Tenn. 1983). As a live and breathing thing, the law changes when necessary to serve the needs of the people. When this basic purpose of the law is slighted or overlooked, then it looses a high degree of its majesty. Powell v. Hartford Accident & Indemnity Co., 398 S.W.2d 727, 732 (Tenn. 1966). "Where the reason fails the rule should not apply." Brown v. Selby, 332 S.W.2d 166, 169 (Tenn. 1960).

Because we find that the reasons for the cause of action no longer exist, and because the public policy of the state, as expressed by the Legislature, is offended by criminal conversation actions, we hold that the common-law tort of criminal conversation is hereby abolished in Tennessee. Consequently, we reverse the judgment of the Court of Appeals and dismiss this action. Costs are taxed to the Appellee.

E. RIIEY ANDERSON, Justice

Concur:

Reid, C.J.

Drowota, O'Brien, and Daughtrey, JJ.

## JUDGMENT

This cause coming on to be heard upon the record from the Court of Appeals, Western Section at Jackson, application for permission to appeal having been heretofore granted, briefs and arguments of counsel; upon consideration whereof, this Court is of opinion that the judgment of the Court of Appeals should be reversed and the cause dismissed.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the judgment of the Court of Appeals is reversed, and the cause dismissed. The cause is remanded to the Circuit Court of Shelby Countv for any further proceedings which may be necessary and proper and for the collection of the costs of the court below, for all of which let the mandate issue.

Costs are taxed to the adpellee, Jerome Howard Hanover, for which execution may issue, if necessary.

4/15/91.

DECISION OF THE TENNESSEE COURT OF APPEALS, WESTERN SECTION

**IN THE TENNESSEE COURT OF APPEALS FOR THE WESTERN SECTION AT JACKSON**

| | | |
|---|---|---|
| **JEROME HOWARD HANOVER,** | ) | |
| | ) | |
| **Plaintiff/Appellee,** | ) | |
| | ) | |
| **vs.** | | SHELBY LAW NO. 58 |
| | ) | |
| **ROBERT M. RUCH, M.D.** | ) | |
| | ) | |
| **Defendant/Appellant.** | ) | |

From the Circuit Court of Shelby County, Tennessee
The Honorable James E. Swearengen, Judge

Al H. Thomas, Memphis
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Hal Gerber, Memphis
GERBER LAW OFFICES
and
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Opinion Filed: **MAY 1 1990**

AFFIRMED

McLEMORE, Sp. J.

HIGHERS, J. (Concurs)

FARMERt J. (Concurs)

In this alienation of affections and criminal conversation suit the plaintiff Hanover obtained a jury verdict for compensatory and punitive damages on the common law tort of criminal conversation but the jury returned a verdict for the defendant Ruch on the common law tort of alienation of affections. Summary judgment was entered with respect to a count of medical malpractice.

The defendant has appealed insisting that the common law tort of criminal conversation should be abolished and contending: (1) that the plaintiff failed to prove any damages, (2) that the question of punitive damages should not have been submitted to the jury and, if so, the award was excessive, and (3) that certain evidence of the defendant should not have been excluded from the jury. The plaintiff has raised no issue on appeal.

The Hanovers were married in 1955 and during the course of that union six children were born. Mrs. Hanover testified that there had been sexual dysfunction in the marriage. In their sex relationship he was satisfied but she was not. It is undisputed that the defendant and Mrs. Hanover engaged in sexual acts on several occasions and that these sexual acts constituted adultery and were entered into voluntarily by both parties. -The affair began in October 1983, and their getting together was mutually planned on a day that Mrs. Hanover had been in Dr. Ruch's office. He asked her if she would come back that evening, which she did, and when she walked in, she didn't know what she expected but she knew it could happen that she could have sex with him. The defendant

admitted that there was sexual gratification for both people that night in his of f ice and when the evening was over it was decided that there would be more of the same. The affair ended in November 1985. Plaintiff filed for divorce in February 1986, and subsequently obtained a divorce on the ground of adultery.

Since the jury found in favor of the defendant on the issue of alienation of affections the issues raised here relate only to the separate tort of criminal conversation.

Criminal conversation means adulterous relations between the defendant and the spouse of the plaintiff. Rheudasil v. Clower, 197 Tenn. 27, 276 S.W.2d 345 (1953); Darnell v. McNichols, 22 Term. App. 287, 122 S.W.2d 808 (1938). It is synonymous with adultery. An action will not lie unless there is a valid marriage between the spouses and there is sexual intercourse between defendant and plaintiff I s spouse during coverture. Alienation of the spouse's affections is not a necessary element but is regarded merely as a matter of aggravation. Darnell, supra. Consent of the participating spouse is not a defense. It is of no importance that the participating spouse was the aggressor or procures the defendant to have intercourse with her. Stepp v. Black, 14 Tenn. App. 153 (1931). The only defense to the action is connivance of the plaintiff. Both knowledge and acquiescence must be shown to establish consent or connivance. Recovery is assured upon proof of the marriage between plaintiff and his spouse and an act of adul-

tery occurring between the defendant and plaintiff's spouse during the marriage.

As in this case, historically this action has often times been brought as a companion case to the tort of alienation of affections. The tort of alienation of affections was abolished by the General Assembly of Tennessee effective July 1, 1989 by Chapter 517, Public Acts of Tennessee 1989, but this action by the Legislature has no bearing on this lawsuit since the alleged alienation of affections sued for here occurred before the date of abolishment.

The defendant has asked at every stage of the proceeding that the Court abolish the action for criminal conversation. The clear nationwide trend has been to abolish the torts of alienation of affections and criminal conversation, as both have been susceptible to considerable abuse. See Comment, Stealing Love in Tennessee: The Thief Goes Free, Tennessee Law Review, Vol. 56, p. 629, 656 (1989). These actions have become notoriously fertile ground for blackmail and extortion by means of manufactured suits brought by plaintiffs with vindictive motives. The result has been the statutory abolition of the actions by most states. Other states have abolished the actions judicially, or have narrowed them to insignificance by severely restricting recoverable damages. Id. 657.

In judicially abolishing the actions of alienation of affections and criminal conversation, the Court of Appeals of North Carolina in Cannon v. Miller, 322 S.E.2d 780 (N.C. App. 1984), said that

the primary justification behind the abolition of the tort of criminal conversation is the lack of logically valid defenses on the merits and quoted from cases from South Dakota, Pennsylvania, Washington and Iowa as follows:

> . . . [T]hat apart from the fact that the action for criminal conversation was by nature seriously prone to abuse, the cause of action itself was anachronistic because the antiquated common law reasoning of the wife's inferiority which lay 'behind stripping a defendant of all defenses to an action in criminal conversation, save the plaintiff's consent, no longer merits endorsement.'

Id. at 796.

> . . . in today's society it is unreasonable to impose upon a defendant such harsh results without affording any real opportunity to interject logically valid defenses on the merits such as the role of the plaintiff's spouse in adulterous relationship or the quality of the plaintiff's marriage prior to the occurrence of the acts constituting the tort.
>
> Wives are not property. Neither are husbands. The love and affection of a human being who is devoted to another human being is not susceptible to theft. There are simply too many intangibles which defy the concept that love is property.
>
> A fundamental flaw in the criminal conversation remedy, as opposed to the alienation of affections remedy, is its insensitive imposition (of liability) without regard to the viability of the marriage relationship, or to the fact'. in a given instance, that (the) relationship may not have been affected adversely. In short, recovery may be allowed where stability of the marriage survives unimpaired.

Id. at 797.

The North Carolina court then considering both the action for alienation of affections and the action for criminal conversation concluded:

> Unarguably, the integrity of the marriage relation and the preservation of marital harmony are interests deserving of

judicial protection. Yet, we find general agreement among the authorities who have examined the issue that, on balance, the social harm engendered by the existence of these torts and the actual counterproductive effect of the actions on a marriage outweigh the meritorious goals purportedly served by the actions. We find the reasons advanced by the majority of judicial authorities, commentators and state legislatures for the abolition of these actions to be well-founded and convincing.

. . . [I]n determining whether the actions further equity for individuals, equity to the plaintiff is not the only consideration. The adverse results caused to defendants and third parties must also be taken into account. The peculiar susceptibility of these actions to abuse and the disproportionate publicity occasioned by the connotation of sexual misbehavior pose significant inequities to defendants and other family members. The potential damage to reputations, and the threat to sue can 'easily become, in effect, schemes of extortion and blackmail. These abuses are likely to be especially prevalent in divorce settlements where the threat of suit may serve as a powerful leverage for the potential plaintiff in obtaining a disproportionate share of the marital property. The threat of public scandal that can be engendered by the filing of these causes of action was a major consideration behind the initial legislative movement to abolish the actions and there is no reason to believe the problems is any less prevalent today.

Id. at 800.

Apart from considerations of utility, we are persuaded that the very theory of recovery underlying both actions is without basis in contemporary society. The above actions have never fully shaken free for their property-based origins, as evidenced by fact that the consent of the participating spouse to the of f ending conduct, or even his or her initiation of it, will not bar the suit. Yet unarguably, spousal love and all its incidents do not constitute property that is subject to 'theft' or 'alienation.'

Id. at 801.

It must be emphasized that we in no manner condone extra-marital relationships or sexual promiscuity. However, we fully agree with the prevailing judicial view that because neither the statutory nor the common law imposes any obligation on married persons to maintain love or affection for each other, there is no ground in law or logic f or

> recognizing a cause of action by one spouse against a third party to whom the other spouse has chosen to engage in consensual sexual relations with.

Id. at 801.

We find the rationale of the North Carolina court persuasive that the tort of criminal conversation should also be abolished in this state as has the action of alienation of affections. After careful consideration, we are of the opinion that abolishment lies with the legislature or with the Supreme Court. We are an intermediate court. We are bound by the present law. We think the language of Judge Crawford in Hollingsworth v. Safeco Ins. Co., 782 S.W.2d 477, 479, is applicable to our authority in the case sub judice. In that case the Court said:

> There is a marked difference between the Supreme Court, the highest court in the state, and the Court of Appeals, an intermediate appellate court. It is the duty of the Court of Appeals to apply the law as promulgated the legislature or as announced by the Supreme Court. This Court is bound by the Supreme Court's decisions under the doctrine of ' stare decisis and in no way is it the function of this court to intentionally reverse the holding of the Supreme Court.

Compensatory Damages

The scope of review applicable to a jury verdict approved by the trial judge is whether there is any material evidence to support the verdict. T.R.A.P. 13(d). The amount of the jury's verdict invokes the material evidence rule, just as it does with respect to all other factual issues upon which appellate review is sought.

Poole v. Kroger Co., 604 S.W.2d 52 (Tenn. 1980); Ellis v. White Freightliner Corp., 603 S.W.2d 125 (Tenn. 1980). If there is any evidence to support the verdict it must be affirmed.

We have pointed out supra that criminal conversation has all the characteristics of a strict liability tort. The measure of damages for criminal conversation is founded on the loss of consortium. Scates v. Naming, 268 S.W.2d 561, 563 (Tenn. 1954), Rheudasel v. Clower, 270 S.W.2d 345, 346 (Tenn. 1954). [T]he aggrieved spouse is entitled to recover from anyone who, without the consent of the aggrieved spouse, has sexual relations with the other spouse, even though the aggrieved spouse sustains no further loss. . . . The plaintiff is entitled to recover for emotional distress resulting from the fact that the defendant has had sexual relations with the other spouse. In determination of the amount recoverable for the emotion distress, the plaintiff' s neglect or indifference toward the other spouse is a factor to be considered. If, during the marriage with the plaintiff the other spouse has repeatedly had sexual relations with the defendant, the plaintiff's damages will be enhanced; if the other spouse has previously had sexual relations with other persons, the damages will be reduced. If, in addition to the loss of exclusive cohabitation with the other spouse, the plaintiff has lost the latter's affect-ions and services in the home, there can be recovery for the loss. . . Restatement (Second) of Torts, § 685, comments d. and g. (in part).

Clearly, under our law, the plaintiff was entitled to damages. Clearly, under our law there was evidence to support the finding of the jury as to an award of $25,000 compensatory damages. In the case of Stepp v. Black, supra, this Court said:

> It is the general rule that courts will seldom interfere with the finding of a jury in actions for criminal conversation and alienation of the affections of a spouse, for the reason that there is no method of determining exactly the proper pecuniary compensation which should be awarded. Therefore, unless it is apparent that the jury was influenced by prejudice and passion, its award will seldom be interfered with. . .

Id. at 170.

Punitive Damages

Punitive damages may be awarded in cases of criminal conversation. In speaking on the subject matter the Court in Stepp v. Black, supra, said:

> Such damages may be awarded on the basis of the willful, aggravated, malicious, or wanton character of the offense. 30 C.J., 1151. The rule in Tennessee is that exemplary damages are allowed when the wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations. The turpitude of defendant's conduct is alone considered and there must be a wrong intent on his part. (Citations omitted).
>
> Upon a cause of action for punitive as well as compensatory damages, the function of the court is to determine whether or not , the evidence tends to show facts which warrant exemplary damages; the function of the jury is then to determine the sufficiency of such facts.

Id. at 166.

Malice in this type of case means nothing more than an intent to act without justification or excuse. Prosser and Keeton on the Law of Torts, 5th Ed. p. 920.

Defendant admitted that he had numerous acts of sexual intercourse with plaintiff's spouse. Defendant, medical doctor, saw the spouse professionally in his office and was attracted to her. The spouse-patient confided to the doctor-defendant that she was not being sexually satisfied by her husband. The defendant invited plaintiff I s spouse back to his office after visiting hours. Many clandestine meetings then took place over the two-year period where the defendant and plaintiff's spouse had sexual intercourse. There is proof that plaintiff's spouse had never been violated by any other man during her twenty-eight years of marriage and at the time the plaintiff discovered defendant's sexual affair with his wife, neither plaintiff nor his wife was contemplating a divorce. Under such circumstances we find no error in the trial judge's action in submitting the question of punitive damages to the jury.

Defendant complains that the amount of punitive damages was greatly disproportionate. but does not cite any evidence in the record in support. Actually, defendant's argument is that plaintiff failed to prove actual or compensatory damages and therefore no punitive damages can be allowed relying upon the rule stated in Allen v. Melton, 20 Tenn. App. 387, 99 S.W.2d 219 (1936). This rule has no application here as we have pointed out that the proof supports an award of compensatory damages.

Proof was offered as to the net worth of Dr. Ruch, his adjusted gross income for the years 1984, 1985, 1986, 1987, and his estimate of his 1988 income. This evidence was such as to support the amount of the award of damages by the jury.

Under Tennessee law we f ind no error in the award as to punitive damages.

The trial court ref used to allow the defendant to testify as to what Mrs. Hanover told him concerning unhappiness with her marriage and the sexual dysfunction of plaintiff. The trial court also refused to allow defendant to testify that Mrs. Hanover told him that her relationship with defendant affected her home life positively - that it made her more gentle with her husband and that she got along better because of it. Further, the trial court refused to allow defendant to testify that he told Mrs. Hanover that he loved his wif e; that he admired her and did not want to hurt her and that she agreed and she did not want to either.

Mrs. Hanover was called as a witness by the defendant and testified in detail as to all of the foregoing, thus any such exclusion was harmless. The jury returned a verdict for the defendant on the issue of alienation of affections. Even if these statements were admissible in defense to the tort of alienations of affections their exclusion as to the tort of criminal conversation was not reversible error. We have heretofore pointed out that malice in this tYPe of case means nothing more than an intent to act without justification or excuse. Prosser and Keeton on the Law of Torts, supra.

Having found no error, the judgment of the trial court is affirmed.

The costs are taxed against the appellant for which let execution issue, if necessary.

BROOKS McLEMORE, Sp. J.

HIGHERS, J

FARMER, J.

**IN THE TENNESSEE COURT OF APPEALS**
**FOR THE WESTERN SECTION AT JACKSON**

| | | |
|---|---|---|
| **JEROME HOWARD HANOVER,** | ) | |
| | ) | |
| **Plaintiff/Appellee,** | ) | |
| | ) | |
| **vs.** | | **SHELBY LAW NO. 58** |
| | ) | |
| **ROBERT M. RUCH, M.D.** | ) | |
| | ) | |
| **Defendant/Appellant.** | ) | |

**ORDER**

This matter came on to be regularly heard and considered by the Court on the record, and for the reasons stated in the opinion of the Court, filed this date, it is ordered that:

1. The judgment of the trial court is affirmed.

2. Costs are adjudged against the appellant for which execution may issue, if necessary.

ENTERED MAY 1, 1990

McLEMORE, Sp. J.

HIGHERS, J.

FARMER, J.

Supreme Court, U.S.
FILED
SEP 30 1991
OFFICE OF THE CLERK

(2)

No. 91-525

In The

# Supreme Court of the United States

October Term, 1991

JEROME HOWARD HANOVER,

*Petitioner,*

v.

ROBERT M. RUCH, M.D.,

*Respondent.*

## Petition For Writ Of Certiorari To The Supreme Court Of Tennessee At Jackson

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## ARGUMENT

### A. Petitioner has mischaracterized the decision of the Tennessee Supreme Court.

The principal thrust of the Petition for Certiorari is that the Opinion of the Supreme Court of Tennessee violates the due process clause of the Fourteenth Amendment to the United States Constitution because it is said to have retroactive effect.

Petitioner asserts that the Tennessee Supreme Court has given retroactive effect to an act of the Tennessee General Assembly, which it did not. In support, reference is made to a host of reported cases. A review and discussion of those cases reveals that, with one exception, they concern themselves with the retroactive application of legislation (Petition, p. 33).

*Hughes v. Washington*, 389 U.S. 290 (1967) arose out of a fact setting wholly dissimilar to those presented here. *Hughes* involved a controversy over the ownership of gradual accretions of land along the coast of Washington. The Plaintiff traced her title to a federal grant. Federal law in effect at the time of the grant had preserved ownership of accretions to the adjoining landowner. The Constitution of Washington, however, which was adopted after the particular grant from which Plaintiff derived her title, deprived the adjoining landowners of ownership of the accretions. The Washington Supreme Court, ruled that the state constitutional provision controlled and held that all accretions formed since the adoption of the state constitution would belong to the state of Washington. This Court reversed, holding that federal law would control. Petitioner here cites, out of context, a portion of the

last sentence of a concurring Opinion by Justice Stewart. That opinion, when read in its entirety, stands for the proposition that a dramatic change in state law cannot defeat the property interests of landholders whose rights have been established and defended under federal law and previous state law. Neither the facts nor the legal analysis in *Hughes* has any applicability to the current case.

The opinion of the Tennessee Supreme Court made no attempt to give retroactive affect to legislation. Neither did it seek to make retroactive a change in the state common law. Rather, it rendered a decision based on the facts and legal arguments presented by this case. The Complaint alleged claims for alienation of affections and criminal conversation. As noted by Petitioner and the opinion of the Tennessee Court of Appeals, Respondent has, at every stage of the proceedings, moved the abolition of criminal conversation as a cause of action in Tennessee (Petition, p. 3, Appendix – p. 22). Actually, the issue was originally raised in the trial court pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure, which is identical in all pertinent respects to Federal Rule 12(b)(6). When first served with the complaint in this case, Respondent alleged that the complaint did not state a claim upon which relief should be granted. He then moved to dismiss. The trial court, bound by prior state and appellate decisions, overruled the motion. At trial, the jury returned a verdict for Respondent on the issue of alienation of affections but for Petitioner on the claim of criminal conversation (Petition Appendix pp. 4, 21). On appeal, the Tennessee Court of Appeals unmistakably indicated that criminal conversation should no longer be

a part of Tennessee law, but, once again, felt constrained by previous opinions of the Tennessee Supreme Court. The Court of Appeals, in fact, stopped just short of suggesting that the Respondent should seek further review.

The Tennessee Supreme Court dealt, first, with its authority to decide whether or not criminal conversation could be judicially abolished. The Tennessee General Assembly, after the trial in this cause, passed legislation which abolished criminal conversation (Petition, pp. 4, 33)[1]. That legislation did not, however, affect this case which arose and was tried prior to the action of the General Assembly. The Tennessee Supreme Court found that there was no legislation which controlled the controversy and, therefore, it was the final arbiter of the state of the common law at the time the controversy arose. Any reliance on the actions of the General Assembly was only additional and cumulative evidence that the theories of recovery no longer conformed to public policy. The opinion relied to a greater degree on the legislation and case law of sister states.

The decision below, therefore, does not have to do with retroactive application of law. The Tennessee Supreme Court in effect held that the complaint did not state a claim against the Respondent upon which relief could be granted. Respondent had, as noted above, consistently so argued from the beginning.

---

[1] Criminal conversation was abolished prospectively, to become effective January 1, 1991. Since it continued to exist as a common law cause of action until that date, it was still susceptible to the same attack as that mounted by Respondent in 1986 when the complaint was filed in this case.

**B. This Court should not grant certiorari to consider constitutional issues not raised in the state court proceedings.**

Conspicuously absent from the opinions of the Tennessee Appellate Courts is any mention or analysis of the constitutional issues presented herein by the Petitioner. Those issues are not absent from the consideration of the courts below due to omission. The constitutional issue was, in fact, never raised before the trial court, the Tennessee Court of Appeals or the Tennessee Supreme Court.[2]

This Court has long held that, in reviewing the decisions of state courts, it will not consider constitutional issues which were not raised, preserved or passed on in the state courts. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Hill v. California*, 401 U.S. 797 (1971).

> In the context of that case, we indicated the desirability of allowing state courts to pass first on the constitutionality of state statutes in light of a federal constitutional challenge; this assures both an adequate record and that the States have first opportunity to provide a definitive interpretation of their statutes.

*Hill*, 401 U.S. at p. 6.

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[2] It should be noted that the Petitioner did claim a denial of due process under the United States Constitution in a Petition to Rehear filed in the Tennessee Supreme Court, which was denied (Appendix to Petition, p. 2).

Although the quoted language applies to a criminal case and concerns the constitutionality of statutes, the same reasoning or rationale applies to the present case. The due process arguments were neither considered nor decided by the courts below.

**C. Petitioner was afforded due process.**

The Petition alleges a denial of due process. To the contrary, the opinion of the Tennessee Supreme Court shows that Petitioner was afforded due process.

Petitioner filed a complaint in the Tennessee state court. Respondent answered, alleging that the complaint did not state a claim upon which relief could be granted because recovery for criminal conversation was repugnant to public policy and had no legal merit. That defense was argued and decided adversely to respondent. The issue was appealed to the Tennessee Court of Appeals and affirmed. Finally, it was reviewed by the Tennessee Supreme Court upon briefs and oral argument by counsel for both parties. Now, since that Court decided the issue adversely to the Petitioner, he argues that he did not have opportunity to defend "vested" property rights. He seeks to have this Court construe the decision of the Tennessee Supreme Court as one which makes retroactive an act of the Tennessee General Assembly.

Actually, the Tennessee Supreme Court handled this matter as it must any other. It considered the facts and legal arguments presented by the parties before it. Based on those facts and arguments, it determined that a change

in the state common law was mandated. That determination vacated a previous jury verdict. The current attack on that opinion is, in truth, not rooted in a good faith argument that there was a failure of due process protection. Rather, Petitioner seeks to have this Court find that the decision below was wrong. The Petition for Writ of Certiorari should not be granted to achieve that purpose.

In pursuit of his argument, Petitioner seems to confuse the role of the Supreme Court of Tennessee. He asserts that " . . . five men sitting as a judicial body can arbitrarily substitute their *personal, not legal,* beliefs . . . " (Petition, pp. 4, 17). This characterization is not only an affront to the Supreme Court of Tennessee, but there is absolutely nothing in the record to support it. Moreover, in an apparent Freudian slip, Petitioner repeatedly refers to "five men" in describing the composition of the Tennessee Supreme Court. Actually, four members are male and one is female.

## CONCLUSION

For the reasons stated, the Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 11 1991
OFFICE OF THE CLERK

(3)

91-525

No. _____

IN THE

# Supreme Court of the United States

October Term, 1991

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ROBERT M. RUCH, M.D.,

Respondent.

Petition For Writ Of Certiorari To The
Supreme Court Of Tennessee, At Jackson

## PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## A. *Respondent has misstated the assertions of the Petitioner*

At page 1 of his *Response*, Respondent states that *"Petitioner asserts that the Tennessee Supreme Court has given retroactive effect to an act of the Tennessee General Assembly, which it did not."* Respondent is totally incorrect in his synopsis of Petitioner's argument. The correct statement is that Petitioner asserted that the particular decision of the Tennessee Supreme Court at issue violated the due process clause of the United States Constitution because it retroactively took away a vested substantive right of the Petitioner.

At page 2, Respondent states that *"[T]he opinion of the Tennessee Supreme Court made no attempt to give retroactive affect [sic] to legislation. Neither did it seek to make retroactive a change in the state common law."* However, in effect, this is exactly what the opinion of the Tennessee Supreme Court attempts to do! How else can the action or opinion be described. The Tennessee Legislature passed a law on April 12, 1990 abolishing the tort of criminal conversation but specifically decided that this repeal of long-standing law was not to go into effect until January 1, 1991. By its opinion of April 15, 1991, the Tennessee Supreme Court has retroactively abolished a common law that was first

judicially recognized by the Tennessee Supreme Court in Stepp v. Black, 14 Tenn. App. 153 (1931), cert. denied March 5, 1932 and which was subsequently codified in the Tennessee Code Annotated. Thus, the facts are entirely contrary to this above-quoted statement found at the beginning of paragraph one at page 2 of the Respondent's *Response.*

On the last paragraph of page 3, Respondent states that *"[T]he decision below, therefore, does not have to do with retroactive application of law. The Tennessee Supreme Court in effect held that the complaint did not state a claim against the Respondent upon which relief could be granted."*[1] Petitioner would assert that such analysis is contorted. A Rule 12(b)(6) defense for failure to state a claim upon which can be granted is routinely included by defense lawyers in all initial *"answers"* to *"complaints"* for the premise that the complaint fails to state facts which entitle the Plaintiff to relief under the common or statutory law then existing at the time the acts complained of occurred. The only way for such a statement to be true in this case, that is, to say that Respondent Dr. Ruch's conduct did not give rise to a tort

[1] The standard Rule 12(b)(6) defense under the Federal Rules of Civil Procedure. Under the Tennessee Rules of Civil Procedure, the proper cite is Rule 12.02(6).

cause of action on behalf of Petitioner Hanover at the time Dr. Ruch was admittingly committing these acts, is to retroactively apply the law of the Tennessee Legislature passed on April 12, 1990 or the opinion of the Tennessee Supreme Court rendered on April 15, 1991! There is absolutely no other method by which one could give any credence to the rule 12(b)(6) defense in this case except by retroactively abolishing the law of criminal conversation as the Tennessee Supreme Court has done by its decision in the case sub judice. Thus, the statement by counsel for Respondent should read that *only by first giving retroactive application to its decision below, the Tennessee Supreme Court in effect held that the complaint did not state a claim against the Respondent upon which relief could be granted.*

### *B. Petitioner had no basis for raising any constitutional issue in the state court proceeding until after the Tennessee Supreme Court had rendered its opinion.*

Respondent argues that Petitioner waived his right to rely on the constitutional arguments now made before this court because they were not raised before the trial court or the Tennessee Appellate Court or the Tennessee Supreme Court. The law in Tennessee is that a **defendant** waives his right to raise

constitutional issues as a defense if not raised in the lower court. Here, Petitioner had no right or reason to raise any constitutional issues in the lower court because the case proceeded to trial and he obtained a jury verdict on the tort of criminal conversation. Contrary to Respondent's assertion that Petitioner did not raise the issue before the Tennessee Appellate Court or the Tennessee Supreme Court, counsel for Petitioner Hanover did address in the appellate court appellee's brief[2] that it was absurd for Dr. Ruch to ask the appellate court to retroactively abolish the tort for two reasons; one, because the legislature had already addressed this situation by the passage of the law on April 12, 1990, and two, because Mr. Hanover had a vested right in such action. Similar arguments were made to the Tennessee Supreme Court in Mr. Hanover's brief after Dr. Ruch appealed to such court. Mr. Hanover certainly had no reason to address such an issue in the trial court on his behalf at that time. Further, when the Tennessee Supreme Court acted in this case by its opinion released on April 15, 1991 to retroactively abolish the tort of criminal conversation, Mr. Hanover filed a Petition to Rehear, the sole basis of which was that the action by the Tennessee Supreme Court was unconstitutional in that it retroactively did away with his vested

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[2] Mr. Hanover was the appellee in the Tennessee Court of Appeals.

cause of action and subsequent judgment, all of which certainly violated the due process clause of the U.S. Constitution, if not the Tennessee Constitution.

### C. *This is not a case of "due process" as suggested by Respondent but rather a case dealing with a violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution.*

Counsel for Petitioner is at a loss to try to understand the logic behind the argument raised by Respondent at "subtitle C" of his *Response,* beginning at page 5 therein. Respondent states that Petitioner was **afforded due process** because his case was permitted to go to trial, and then the case was subsequently reviewed by the Tennessee Appellate Court and the Tennessee Supreme Court, just as any and all other cases filed in the legal system in Tennessee would have been handled! Such analysis is totally missing the thrust of the basis for Petitioner's "due process complaint" in the case sub judice. Then, Respondent states at page 6 that *"rather, (what) Petitioner (really) seeks to (do is to) have this Court find that the decision (of the Tennessee Supreme Court) below was wrong."* Yes, as in any situation where a review is sought, the Petitioner is asking that the higher "court find that the decision (of the lower court) below was wrong." Respondent

suggests that one may not come before this Court asking that the Court find that the decision of the lower state or federal court was wrong!

Thus, apparently, Respondent is suggesting that the argument concerning lack of "due process" is limited to situations where persons were not afforded their "day in court!" If so, Respondent has totally misunderstood the legal meaning of a violation of the due process clause of the U.S. Constitution. The meaning of such was fully addressed by Petitioner in the Petition for Writ of Certiorari. Most probably, Respondent has resorted to such analysis and filed a *Response* totally devoid of any substantive argument to counter those raised by Petitioner in the Petition for Writ of Certiorari for one reason. Counsel for Respondent apparently realizes that the action taken by the Tennessee Supreme Court in this case was indeed totally violative of the **Fourteenth Amendment to the Constitution of the United States**.

---

## CONCLUSION

For all of the foregoing reasons, Petitioner Jerome Hanover respectfully submits that this Court should grant his Petition, that a writ of certiorari should issue, and that the decision of the Tennessee Supreme Court below should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served 3 copies of the foregoing pleading on all adverse parties and/or their respective attorney(s) of record, Hal Gerber, Attorney at Law, Brinkley Plaza, 80 Monroe Avenue, Suite 410, Memphis, Tennessee 38103, and Deborah Godwin, Attorney at Law, 263 Court Avenue, Memphis, Tennessee 38103, U.S. mail, postage prepaid, this October 11, 1991.

Ira M Thomas

IRA M. THOMAS